UNCITRAL MODEL LAW AND ARBITRATION LAW IN BANGLADESH: AN ANALYTICAL STUDY OF MAJOR DISPARITIES

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1. Introduction:

Since it is equitable to be willing that a difference shall be settled by discussion rather than by force, in recent years, there have been more discussions about taking a systems approach in order to offer different kinds of options to people who are in conflict; to foster appropriate dispute resolution, and obviously those will be the processes and techniques that fall outside of the government judicial processes; and alternatives to litigation. As our system is too costly and too painful, we need to provide mechanisms that can produce an acceptable result in the shortest possible time, with the shortest possible expense and with a minimum of stress on the participants; a system of law which comes to achieve the aims of combining strength with flexibility; a system that yields enforceable decisions backed by a judicial framework with the authority of calling upon the coercive powers of the state and allows the contestant to choose procedures which fit the nature of the dispute and the business context in which it occurs. Among all the forms of alternative dispute resolution, it is only the arbitration which is offering that desired system with the aim of achieving strength with flexibility.[1] The law makers are coming to a consensus that even if the issues are complex and that litigation is inevitable, the issues can be narrowed and even settled by first submitting the dispute to arbitation. However, the success of arbitratin in effective and quicker disposal of disputes has facilitated this form of dispute settlement as a serious alternative to litigation.

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1 In its broadest sense, arbitration is a vehicle of dispute resolution in which parties to a contract select a neutral arbitrator (or a panel of arbitrators) to present their dispute for a legally binding ruling.

However, it is not known exactly when formal non-judicial arbitration of disputes first began but it can be said with some certainty that arbitration, as a way of resolving disputes predates formal courts. The growth of international trade however, brought greater sophistication to a process that had previously been largely *ad hoc* in relation to disputes between merchants resolved under the auspices of the *lex mercatoria*. As trade grew, so did the practice of arbitration, eventually leading to the creation of a variant now known as international arbitration, as a means for resolving disputes under international commercial contracts.[2] However, there are different arbitration treaties and conventions to which a party or nation may adhere. One of the most important is the Convention on the Recognition and Execution of Foreign Arbitral Awards of 1958, known as the New York Convention. More than 130 countries have agreed to abide by the terms of this Convention. The New York Convention is promoted by UNCITRAL, the United Nations Commission on International Trade Law. UNCITRAL was established by a resolution of the UN General Assembly in 1966 to promote harmony and unity in international trade. While it does not administer arbitration disputes, UNCITRAL has produced arbitration rules in accordance with which parties may choose to arbitrate. These rules may be used by any public or private entity. In addition, UNCITRAL has issued a Model Law on International Commercial Arbitration that has influenced the national arbitration legislation of more than 45 countries including Bangladesh.

2. The UNCITRAL Model Law: A Sound and Promising Basis for Harmonization and Improvement of National Laws[3]

The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the close of the Commission's 18th annual session. The General Assembly, in its resolution 40/72 of 11 December 1985, recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice". It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of

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2 See for details, http://en.wikipedia.org/wiki/Arbitration

3 Visit for details, http://www.madaan.com/uncitral.html

international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world.

2.1. Background to the Model Law:

The Model Law is designed to meet concerns relating to the current state of national laws on arbitration. The need for improvement and harmonization is based on findings that domestic laws are often inappropriate for international cases and that considerable disparity exists between them.

2.1.1. Inadequacy of Domestic Laws:

A global survey of national laws on arbitration revealed considerable disparities not only as regards individual provisions and solutions but also in terms of development and refinement. Some laws may be regarded as outdated, sometimes going back to the nineteenth century and often equating the arbitral process with court litigation. Other laws may be said to be fragmentary in that they do not address all relevant issues. Even most of those laws which appear to be up-to-date and comprehensive were drafted with domestic arbitration primarily, if not exclusively, in mind.

The expectations of the parties as expressed in a chosen set of arbitration rules or a "one-off" arbitration agreement may be frustrated, especially by a mandatory provision of the applicable law. Unexpected and undesired restrictions found in national laws relate, for example, to the parties' ability effectively to submit future disputes to arbitration, to their power to select the arbitrator freely, or to their interest in having the arbitral proceedings conducted according to the agreed rules of procedure and with no more court involvement than is appropriate. Frustrations may also ensue from non-mandatory provisions which may impose undesired requirements on unwary parties who did not provide otherwise. Even the absence of non-mandatory provisions may cause difficulties by not providing answers to the many procedural issues relevant in an arbitration and not always settled in the arbitration agreement.

2.1.2. Disparity between National Laws:

Problems and undesired consequences, whether emanating from mandatory or non-mandatory provisions or from a lack of pertinent provisions, are aggravated by the fact that national laws on arbitral procedure differ widely. The differences are a frequent source of concern in international arbitration, where at least one of the parties is, and often

both parties are, confronted with foreign and unfamiliar provisions and procedures.Uncertainty about the local law with the inherent risk of frustration may adversely affect not only the functioning of the arbitral process but already the selection of the place of arbitration. A party may well for those reasons hesitate or refuse to agree to a place which otherwise, for practical reasons, would be appropriate in the case at hand. The choice of places of arbitration would thus be widened and the smooth functioning of the arbitral proceedings would be enhanced if States were to adopt the Model Law which is easily recognizable, meets the specific needs of international commercial arbitration and provides an international standard with solutions acceptable to parties from different States and legal systems.

2.2. Salient Features of the Model Law:

2.2.1. Special Procedural Regime for International Commercial Arbitration:

The principles and individual solutions adopted in the Model Law aim at reducing or eliminating the above concerns and difficulties. As a response to the inadequacies and disparities of national laws, the Model Law presents a special legal regime geared to international commercial arbitration, without affecting any relevant treaty in force in the State adopting the Model Law. While the need for uniformity exists only in respect of international cases, the desire of updating and improving the arbitration law may be felt by a State in respect of non-international cases and could be met by enacting modern legislation based on the Model Law for both categories of cases.

2.2.1.1. Substantive and Territorial Scope of Application:

The Model Law defines an arbitration as international if "the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States".[4] The vast majority of situations commonly regarded as international will fall under this criterion. In addition, an arbitration is international if the place of arbitration, the place of contract performance, or the place of the subject-matter of the dispute is situated in a State other than where the parties have their place of business, or if the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

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[4] Article 1(3) of the UNCITRAL Model Law on International Commercial Arbitration, 1985.

As regards the term "commercial", no hard and fast definition could be provided. Article 1 contains a note calling for "a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not". The footnote to article 1 then provides an illustrative list of relationships that are to be considered commercial, thus emphasizing the width of the suggested interpretation and indicating that the determinative test is not based on what the national law may regard as "commercial".

Another aspect of applicability is what one may call the territorial scope of application. According to article 1(2), the Model Law as enacted in a given State would apply only if the place of arbitration is in the territory of that State. However, there is an important and reasonable exception. Articles 8(1) and 9 which deal with recognition of arbitration agreements, including their compatibility with interim measures of protection, and articles 35 and 36 on recognition and enforcement of arbitral awards are given a global scope, i.e. they apply irrespective of whether the place of arbitration is in that State or in another State and, as regards articles 8 and 9, even if the place of arbitration is not yet determined.

The strict territorial criterion, governing the bulk of the provisions of the Model Law, was adopted for the sake of certainty and in view of the following facts. The place of arbitration is used as the exclusive criterion by the great majority of national laws and, where national laws allow parties to choose the procedural law of a State other than that where the arbitration takes place, experience shows that parties in practice rarely make use of that facility. The Model Law, by its liberal contents, further reduces the need for such choice of a "foreign" law in lieu of the (Model) Law of the place of arbitration, not the least because it grants parties wide freedom in shaping the rules of the arbitral proceedings. This includes the possibility of incorporating into the arbitration agreement procedural provisions of a "foreign" law, provided there is no conflict with the few mandatory provisions of the Model Law. Furthermore, the strict territorial criterion is of considerable practical benefit in respect of articles 11, 13, 14, 16, 27 and 34, which entrust the courts of the respective State with functions of arbitration assistance and supervision.

2.2.1.2. Delimitation of Court Assistance and Supervision:

As evidenced by recent amendments to arbitration laws, there exists a trend in favour of limiting court involvement in international commercial arbitration. This seems justified in view of the fact that the parties to an

arbitration agreement make a conscious decision to exclude court jurisdiction and, in particular in commercial cases, prefer expediency and finality to protracted battles in court.

In this spirit, the Model Law envisages court involvement in the following instances. A first group comprises appointment, challenge and termination of the mandate of an arbitrator (articles 11, 13 and 14), jurisdiction of the arbitral tribunal (article 16) and setting aside of the arbitral award (article 34). These instances are listed in article 6 as functions which should be entrusted, for the sake of centralization, specialization and acceleration, to a specially designated court or, as regards articles 11, 13 and 14, possibly to another authority (e.g. arbitral institution, chamber of commerce). A second group comprises court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court-ordered interim measures of protection (articles 8 and 9), and recognition and enforcement of arbitral awards (articles 35 and 36).

Beyond the instances in these two groups, "no court shall intervene, in matters governed by this Law". This is stated in the innovative article 5, which by itself does not take a stand on what is the appropriate role of the courts but guarantees the reader and user that he will find all instances of possible court intervention in this Law, except for matters not regulated by it (e.g., consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits). Especially foreign readers and users, who constitute the majority of potential users and may be viewed as the primary addressees of any special law on international commercial arbitration, will appreciate that they do not have to search outside this Law.

2.2.2 Arbitration Agreement:

Chapter II of the Model Law deals with the arbitration agreement, including its recognition by courts. The provisions follow closely article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (hereafter referred to as "1958 New York Convention"), with a number of useful clarifications added.

2.2.2.1. Definition and Form of Arbitration Agreement:

Article 7(1) recognizes the validity and effect of a commitment by the parties to submit to arbitration an existing dispute ("compromis") or a

future dispute ("clause compromissoire"). The latter type of agreement is presently not given full effect under certain national laws.

While oral arbitration agreements are found in practice and are recognized by some national laws, article 7(2) follows the 1958 New York Convention in requiring written form. It widens and clarifies the definition of written form of article II(2) of that Convention by adding "telex or other means of telecommunication which provide a record of the agreement", by covering the submission-type situation of "an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another", and by providing that "the reference in a contract to a document" (e.g. general conditions) "containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract".

2.2.2.2. Arbitration Agreement and the Courts:

Articles 8 and 9 deal with two important aspects of the complex issue of the relationship between the arbitration agreement and resort to courts. Modelled on article II(3) of the 1958 New York Convention, article 8(1) of the Model Law obliges any court to refer the parties to arbitration if seized with a claim on the same subject-matter unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The referral is dependent on a request which a party may make not later than when submitting his first statement on the substance of the dispute. While this provision, where adopted by a State when it adopts the Model Law, by its nature binds merely the courts of that State, it is not restricted to agreements providing for arbitration in that State and, thus, helps to give universal recognition and effect to international commercial arbitration agreements.

Article 9 expresses the principle that any interim measures of protection that may be obtained from courts under their procedural law (e.g. pre-award attachments) are compatible with an arbitration agreement. Like article 8, this provision is addressed to the courts of a given State, insofar as it determines their granting of interim measures as being compatible with an arbitration agreement, irrespective of the place of arbitration. Insofar as it declares it to be compatible with an arbitration agreement for a party to request such measure from a court, the provision would apply irrespective of whether the request is made to a court of the given State or of any other country. Wherever such request may be made, it may not

be relied upon, under the Model Law, as an objection against the existence or effect of an arbitration agreement.

2.2.3. Composition of Arbitral Tribunal:

Chapter III contains a number of detailed provisions on appointment, challenge, termination of mandate and replacement of an arbitrator. The chapter illustrates the approach of the Model Law in eliminating difficulties arising from inappropriate or fragmentary laws or rules. The approach consists, first, of recognizing the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an *ad hoc* agreement, the procedure to be followed, subject to fundamental requirements of fairness and justice. Secondly, where the parties have not used their freedom to lay down the rules of procedure or a particular issue has not been covered, the Model Law ensures, by providing a set of suppletive rules that the arbitration may commence and proceed effectively to the resolution of the dispute.

Where under any procedure, agreed upon by the parties or based upon the suppletive rules of the Model Law, difficulties arise in the process of appointment, challenge or termination of the mandate of an arbitrator, Articles 11, 13 and 14 provide for assistance by courts or other authorities. In view of the urgency of the matter and in order to reduce the risk and effect of any dilatory tactics, instant resort may be had by a party within a short period of time and the decision is not appealable.

2.2.4. Jurisdiction of Arbitral Tribunal:

2.2.4.1. Competence to Rule on Own Jurisdiction:

Article 16(1) adopts the two important (not yet generally recognized) principles of "*Kompetenz-Kompetenz*" and of separability or autonomy of the arbitration clause. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause shall be treated as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. Detailed provisions in paragraph (2) require that any objections relating to the arbitrators' jurisdiction be made at the earliest possible time.

The arbitral tribunal's competence to rule on its own jurisdiction, i.e. on the very foundation of its mandate and power, is, of course, subject to court control. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16(3) provides for instant court control in order to avoid unnecessary waste of money and time. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision is not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending with the court. In those less common cases where the arbitral tribunal combines its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36.

2.2.4.2. Power to Order Interim Measures:

Unlike some national laws, the Model Law empowers the arbitral tribunal, unless otherwise agreed by the parties, to order any party to take an interim measure of protection in respect of the subject-matter of the dispute, if so requested by a party.[5] It may be noted that the article does not deal with enforcement of such measures; any State adopting the Model Law would be free to provide court assistance in this regard.

2.2.5. Conduct of Arbitral Proceedings:

Chapter V provides the legal framework for a fair and effective conduct of the arbitral proceedings. It opens with two provisions expressing basic principles that permeate the arbitral procedure governed by the Model Law. Article 18 lays down fundamental requirements of procedural justice and article 19 the rights and powers to determine the rules of procedure.

2.2.5.1. Fundamental Procedural Rights of a Party:

Article 18 embodies the basic principle that the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. Other provisions implement and specify the basic principle in respect of certain fundamental rights of a party. Article 24(1) provides that, unless the parties have validly agreed that no oral hearings for the presentation of evidence or for oral argument be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the

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5 Article 17, ibid.

proceedings, if so requested by a party. It should be noted that article 24(1) deals only with the general right of a party to oral hearings (as an alternative to conducting the proceedings on the basis of documents and other materials) and not with the procedural aspects such as the length, number or timing of hearings.

Another fundamental right of a party of being heard and being able to present his case relates to evidence by an expert appointed by the arbitral tribunal. Article 26(2) obliges the expert, after having delivered his written or oral report, to participate in a hearing where the parties may put questions to him and present expert witnesses in order to testify on the points at issue, if such a hearing is requested by a party or deemed necessary by the arbitral tribunal. As another provision aimed at ensuring fairness, objectivity and impartiality, article 24(3) provides that all statements, documents and other information supplied to the arbitral tribunal by one party shall be communicated to the other party, and that any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties. In order to enable the parties to be present at any hearing and at any meeting of the arbitral tribunal for inspection purposes, they shall be given sufficient notice in advance.[6]

2.2.5.2. Determination of Rules of Procedure:

Article 19 guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to a few mandatory provisions on procedure, and empowers the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Autonomy of the parties to determine the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional domestic concepts and without the earlier mentioned risk of frustration. The supplementary discretion of the arbitral tribunal is equally important in that it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case without restraints of the

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[6] Article 24(2), ibid.

traditional local law, including any domestic rules on evidence. Moreover, it provides a means for solving any procedural questions not regulated in the arbitration agreement or the Model Law.

In addition to the general provisions of article 19, there are some special provisions using the same approach of granting the parties autonomy and, failing agreement, empowering the arbitral tribunal to decide the matter. Examples of particular practical importance in international cases are article 20 on the place of arbitration and article 22 on the language of the proceedings.

2.2.5.3. Default of a Party:

Only if due notice was given, may the arbitral proceedings be continued in the absence of a party. This applies, in particular, to the failure of a party to appear at a hearing or to produce documentary evidence without showing sufficient cause for the failure.[7] The arbitral tribunal may also continue the proceedings where the respondent fails to communicate his statement of defence, while there is no need for continuing the proceedings if the claimant fails to submit his statement of claim.[8]

Provisions which empower the arbitral tribunal to carry out its task even if one of the parties does not participate are of considerable practical importance since, as experience shows, it is not uncommon that one of the parties has little interest in co-operating and in expediting matters. They would, thus, give international commercial arbitration its necessary effectiveness, within the limits of fundamental requirements of procedural justice.

2.2.6. Making of Award and Termination of Proceedings:

2.2.6.1. Rules Applicable to Substance of Dispute:

Article 28 deals with the substantive law aspects of arbitration. Under paragraph (1), the arbitral tribunal decides the dispute in accordance with such rules of law as may be agreed by the parties. This provision is significant in two respects. It grants the parties the freedom to choose the applicable substantive law, which is important in view of the fact that a number of national laws do not clearly or fully recognize that right. In addition, by referring to the choice of "rules of law" instead of "law", the Model Law gives the parties a wider range of options as regards the

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7 Article 25(c), ibid.

8 Article 25(a), (b), ibid.

designation of the law applicable to the substance of the dispute in that they may, for example, agree on rules of law that have been elaborated by an international forum but have not yet been incorporated into any national legal system. The power of the arbitral tribunal, on the other hand, follows more traditional lines. When the parties have not designated the applicable law, the arbitral tribunal shall apply the law, i.e. the national law, determined by the conflict of laws rules which it considers applicable.

According to article 28(3), the parties may authorize the arbitral tribunal to decide the dispute *ex aequo et bono* or as *amiables compositeurs*. This type of arbitration is currently not known or used in all legal systems and there exists no uniform understanding as regards the precise scope of the power of the arbitral tribunal. When parties anticipate an uncertainty in this respect, they may wish to provide a clarification in the arbitration agreement by a more specific authorization to the arbitral tribunal. Paragraph (4) makes clear that in all cases; i.e. including an arbitration *ex aequo et bono*, the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

2.2.6.2. Making of Award and Other Decisions:

In its rules on the making of the award (articles 29-31), the Model Law pays special attention to the rather common case that the arbitral tribunal consists of a plurality of arbitrators (in particular, three). It provides that, in such case, any award and other decision shall be made by a majority of the arbitrators, except on questions of procedure, which may be left to a presiding arbitrator. The majority principle applies also to the signing of the award, provided that the reason for any omitted signature is stated.

Article 31(3) provides that the award shall state the place of arbitration and that it shall be deemed to have been made at that place. As to this presumption, it may be noted that the final making of the award constitutes a legal act, which in practice is not necessarily one factual act but may be done in deliberations at various places, by telephone conversation or correspondence; above all, the award need not be signed by the arbitrators at the same place.

The arbitral award must be in writing and state its date. It must also state the reasons on which it is based, unless the parties have agreed otherwise or the award is an award on agreed terms, i.e. an award which records the terms of an amicable settlement by the parties. It may be added that the Model Law neither requires nor prohibits "dissenting opinions".

2.2.7. Recourse against Award:

National laws on arbitration, often equating awards with court decisions, provide a variety of means of recourse against arbitral awards, with varying and often long time-periods and with extensive lists of grounds that differ widely in the various legal systems. The Model Law attempts to ameliorate this situation, which is of considerable concern to those involved in international commercial arbitration.

2.2.7.1. Application for Setting Aside as Exclusive Recourse:

The first measure of improvement is to allow only one type of recourse, to the exclusion of any other means of recourse regulated in another procedural law of the State in question. An application for setting aside under article 34 must be made within three months of receipt of the award. It should be noted that "recourse" means actively "attacking" the award; a party is, of course, not precluded from seeking court control by way of defence in enforcement proceedings (article 36). Furthermore, "recourse" means resort to a court, i.e. an organ of the judicial system of a State; a party is not precluded from resorting to an arbitral tribunal of second instance if such a possibility has been agreed upon by the parties (as is common in certain commodity trades).

2.2.7.2. Grounds for Setting Aside:

As a further measure of improvement, the Model Law contains an exclusive list of limited grounds on which an award may be set aside. This list is essentially the same as the one in article 36(1), taken from article V of the 1958 New York Convention: lack of capacity of parties to conclude arbitration agreement or lack of valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present his case; award deals with matters not covered by submission to arbitration; composition of arbitral tribunal or conduct of arbitral proceedings contrary to effective agreement of parties or, failing agreement, to the Model Law; non-arbitrability of subject-matter of dispute and violation of public policy, which would include serious departures from fundamental notions of procedural justice.

Such a parallelism of the grounds for setting aside with those provided in article V of the 1958 New York Convention for refusal of recognition and enforcement was already adopted in the European Convention on International Commercial Arbitration (Geneva, 1961). Under its article IX, the decision of a foreign court setting aside an award for a reason

other than the ones listed in article V of the 1958 New York Convention does not constitute a ground for refusing enforcement. The Model Law takes this philosophy one step further by directly limiting the reasons for setting aside.

Although the grounds for setting aside are almost identical to those for refusing recognition or enforcement, two practical differences should be noted. Firstly, the grounds relating to public policy, including non-arbitrability, may be different in substance, depending on the State in question (i.e. State of setting aside or State of enforcement). Secondly, and more importantly, the grounds for refusal of recognition or enforcement are valid and effective only in the State (or States) where the winning party seeks recognition and enforcement, while the grounds for setting aside have a different impact: the setting aside of an award at the place of origin prevents enforcement of that award in all other countries by virtue of article V(1)(e) of the 1958 New York Convention and article 36(1)(a)(v) of the Model Law.

2.2.8. Recognition and Enforcement of Awards:

The eighth and last chapter of the Model Law deals with recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the 1958 New York Convention.

2.2.8.1. Towards Uniform Treatment of All Awards Irrespective of Country of Origin:

By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law draws a new demarcation line between "international" and "non-international" awards instead of the traditional line between "foreign" and "domestic" awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration takes place. Consequently, the recognition and enforcement of "international" awards, whether "foreign" or "domestic", should be governed by the same provisions.

By modelling the recognition and enforcement rules on the relevant provisions of the 1958 New York Convention, the Model Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention.

2.2.8.2. Procedural Conditions of Recognition and Enforcement:

Under article 35(1), any arbitral award, irrespective of the country in which it was made, shall be recognized as binding and enforceable, subject to the provisions of article 35(2) and of article 36 (which sets forth the grounds on which recognition or enforcement may be refused). Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of overcoming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement.

The Model Law does not lay down procedural details of recognition and enforcement since there is no practical need for unifying them, and since they form an intrinsic part of the national procedural law and practice. The Model Law merely sets certain conditions for obtaining enforcement: application in writing, accompanied by the award and the arbitration agreement.[9]

2.2.8.3. Grounds for Refusing Recognition or Enforcement:

As noted earlier, the grounds on which recognition or enforcement may be refused under the Model Law are identical to those listed in article V of the New York Convention. Only, under the Model Law, they are relevant not merely to foreign awards but to all awards rendered in international commercial arbitration. While some provisions of that Convention, in particular as regards their drafting, may have called for improvement, only the first ground on the list (i.e. "the parties to the arbitration agreement were, under the law applicable to them, under some incapacity") was modified since it was viewed as containing an incomplete and potentially misleading conflicts rule. Generally, it was deemed desirable to adopt, for the sake of harmony, the same approach and wording as this important Convention.

3. Arbitration Act in Bangladesh: A Near Mirror Image of the Model Law

Along with the recommendation of the legislative authorities, various representations by the bodies of commerce and industry stressed the

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9 Article 35(2), ibid.

need for replacing the existing law of arbitration with a new legislation amending and consolidating the law relating to arbitration. Furthermore, in view of the desirability of adopting the Model Law and Rules as adopted by the UNCITRAL, with appropriate modification, to serve as a model for legislation on domestic arbitration, the Bill was introduced to enact the law relating to international commercial arbitration, recognition and enforcement of foreign arbitral award and all other arbitrations of domestic nature[10] taking into account the UNCITRAL Model Law and Rules. However, the law on arbitration in Bangladesh was substantially contained in two enactments, namely, the Arbitration (Protocol and Convention) Act, 1937 and the Arbitration Act, 1940 and those were operative side by side in their respective area. It was widely felt that the 1940 Act, which contains the general law of arbitration, has become outdated and amendments were proposed to this Act to make it more responsive to contemporary requirements as well as since, the Act was not applicable to foreign arbitration, [11] to enact the law relating to international commercial arbitration and recognition and enforcement of foreign arbitral award. Thus, the newly re-enacted Arbitration Act, 2001 was enacted by the parliament, which received assent of the President and was published in the Bangladesh Gazette on 24 January 2001 for general information. It extends to the whole of Bangladesh and came into force on and from the 10th day of April 2001 vide notification No. SRO 87 Law/2001 dated 09.04.2001 published in the Bangladesh Gazette Extraordinary dated 10.04.2001 as required under sub-section (3) of section 1. On the commencement of the Arbitration Act, 2001, the Arbitration Act, 1940 and the Arbitration (Protocol and Convention) Act, 1937 stand repealed.

However, the main objectives of the Act are as under:

(i) to comprehensively cover international commercial arbitration, recognition and enforcement of foreign arbitral award and all other arbitrations of domestic nature;

(ii) to make provisions for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;

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10 Preamble of the Arbitration Act, 2001.

11 AIR 1960 Cal 47 (DB).

(iii) to provide that the arbitral tribunal gives reasons for its arbitral award;

(iv) to ensure that the arbitral tribunal remains with in the limits of its jurisdiction

(v) to minimize the supervisory role of courts in the arbitral process

(vi) to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes; and

(vii) to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court.[12]

3.1. Adoption of Model Law:

The Arbitration Act of 2001 marks a radical departure from the earlier arbitration law. It is a combination of the arbitration law evolved over the years and except a few important alterations, it is a near mirror image of the Model Law. The Model Law itself is a revolutionary instrument aimed at uniformity of the law of arbitral procedure and specific needs of international commercial practice. Though the Model Law cannot be said to be comprehensive, as it leaves many important areas of arbitration law and practice untouched, it has served as a model or prototype for many states that have adopted it including Bangladesh by legislation or founded their legislation on it to varying degrees.[13] Adopting the Model Law almost in its entirety not only makes the Bangladeshi arbitration law more accessible and comprehensible, but also makes it more up to date and consistent with international practice.[14] The Bangladeshi Act adopts the following provisions from the Model Law:

(i) The definition and form of arbitration agreement;[15]

(ii) The duty of the judicial authority to refer the parties to arbitration where an action is brought before it in breach of the arbitration agreement;[16]

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12 Malhotra, O P; *The Law and Practice of Arbitration and Conciliation*, first edn, LexisNexis(A division of Reed Elsevier India Pvt. Ltd.), New Delhi, India, 2002, p. 30.

13 Ibid, p. 42.

14 Cf Dicey and Morris, *The Conflict of Laws,* thirteenth edn, 2000, Vol 1, p 595, para 16-007.

15 Section 2(n) and section 9, the Arbitration Act, 2001.

16 Section 10, ibid.

(iii) The power of the tribunal[17] and of the court[18] to grant interim measures of protection in support of an arbitration;
(iv) The composition of the arbitral tribunal;[19]
(v) Appointment of arbitrators;[20]
(vi) Grounds of challenge to an arbitrator;[21]
(vii) Procedure to challenge an arbitrator;[22]
(viii) Termination of the mandate of an arbitrator for failure or impossibility to act;[23]
(ix) Substitution of an arbitrator on termination of his mandate;[24]
(x) The competence of the arbitral tribunal to rule on its own jurisdiction;[25]
(xi) Procedure of arbitration;[26] and
(xii) The grounds for setting aside the arbitral awards.[27]

In addition to the aforesaid provisions, this Act also provides for finality[28] and enforcement[29] of the awards. It makes further provision for appeals against the arbitral awards.[30]

4. Major Disparities between the Model Law and the Arbitration Law in Bangladesh:

The Model Law came at the opportune time and provided main inspiration for enactment of the Arbitration Act, 2001. In structure and content, the Bangladeshi Act greatly draws on the Model Law. It may be noted that though this Act adopts the Model Law as a model or prototype, it is not simply a mirror of the Model Law. There are

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17 Section 21, ibid.
18 Section 7A, ibid.
19 Section 2(o) and section 11, ibid.
20 Section 12, ibid.
21 Section 13, ibid.
22 Section 14, ibid.
23 Section 15, ibid.
24 Section 16, ibid.
25 Section 17, ibid.
26 Sections 23 to 27, 29, 30, 32, 33-37, ibid.
27 Section 43, ibid.
28 Section 39, ibid.
29 Section 44, ibid.
30 Section 48, ibid.

important differences in the two instruments on account of their origins, aims and the local conditions, namely:

4.1. Party Autonomy and Uneven Number of Arbitrators:

The definition of an arbitral tribunal in s 2(o) and the composition of the arbitral tribunal in section 11 of the Arbitration Act, 2001 are modelled on article 2(b) and article 10 of the UNCITRAL Model Law. Section 2(o) of this Act verbatim adopts the definition of an arbitral tribunal in article 2(b)-'a sole arbitrator or a panel of arbitrators'. Article 10 of the UNCITRAL Model Law grants to the parties the greatest possible freedom in the choice of the number of arbitrators to constitute the arbitral tribunal. That is to say, the parties may choose a sole arbitrator or any number of arbitrators including even numbers. In the absence of an agreement of the parties, the default number is three arbitrators. Thus, the minimum number of the panel of arbitrators is a sole arbitrator, default number is three and the maximum number is that which the parties may determine. This article was drafted to accord with article 5 of the UNCITRAL Arbitration Rules which reads, 'if the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrator shall be appointed'.

However, section 11 departs from its Model Law on two aspects; firstly, it provides that the number of arbitrators constituting the arbitral tribunal shall not be an even number unless otherwise agreed by the parties.[31] Secondly, like the Model Law, failure to the determination of the parties the tribunal shall consist of three arbitrators[32] and unlike the Model Law, where they appoint an even number of arbitrators, the appointed arbitrators shall jointly appoint an additional arbitrator who shall act as a Chairman of the tribunal.[33] Thus, the default number is three arbitrators while the maximum number is any uneven number that may be determined by the parties. It is thus evident that the intention of the Parliament was to follow the lead of other countries, which have made it compulsory for an uneven number of arbitrators to be appointed,

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31 Section 11(3), ibid.

32 Section 11(2), ibid.

33 Section 11(3), ibid.; *Krishak Bharati Coop. v. Alutu Inc.* (2002) 3 Arb LR 302 (Del DB).

minimum number being a sole arbitrator.[34] The object of this is to avoid tribunal deadlock in decision making if a simple majority cannot be reached.[35] In an ad hoc arbitration, the parties will have to follow the procedure, agreed upon by them, for appointment of the arbitrator and the presiding arbitrator, but that is rare. Section 4 grants the freedom to the parties to authorize any person to determine the number of arbitrators. The arbitral institutions generally appoint not more than three arbitrators including the presiding arbitrator. However, these provisions are mandatory from which parties cannot derogate.[36] This is also compatible with the main stream of international commercial arbitration.

In a case where the parties, in the exigencies of a situation, decide to have more than one arbitrator, the next number they can opt for is three. Despite the advantage of a sole arbitrator, in modern practice preference is for appointment of three arbitrators, albeit not without rationale. Particularly in the area of commercial arbitration involving complex problems peculiar to special types of disputes e.g. engineering, construction, maritime and trading disputes, a sole arbitrator many times may or may not be suitable for resolution of disputes. In an international commercial arbitration, where large sums of money are at stake, the common practice is to appoint a tribunal comprising of three arbitrators. Even though it may involve more expense and delay than a sole arbitrator arbitration. It is still preferred as it is more effective. 'An arbitral tribunal of three arbitrators is likely to prove more satisfactory to the parties and the ultimate award is more likely to be acceptable to them'.[37] The UNCITRAL Rules reflect this trend in article 5 and a similar provision is contained in the Model Law in article 10(2)[38].

Though the Act permits the parties to determine any odd number of arbitrators, the statutory procedure provided in it does not relate to the appointment of more than a three-arbitrator tribunal.[39] In domestic as well as international commercial arbitrations, an arbitral tribunal with

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34 Section 2(o) of the Arbitration Act, 2001.

35 Redfern and Hunter, *Law and Practice of International Commercial Arbitration,* third edn, 1999, pp. 194-95, para 4-19.

36 *Narayan Prasad Lohia v Nikunj Kumar Lohia* (2002) 1 Raj 381 (SC), per Variava J.

37 Redfern and Hunter, *Law and Practice of International Commercial Arbitration,* third edn, 1999, pp 194, para 4-18.

38 *Ranwa Constn. Co. v. Pant Krishi Bhavan* (2006) 1 Arb LR 209 (Raj).

39 Section 10(3) and section 12(3)(a) of the Arbitration Act, 2001.

more than three arbitrators is not a general norm, because normally there is no reasonable justification for appointing an arbitral tribunal of more than three arbitrators. The mode of appointing more than three arbitrators is almost invariably prescribed in the contract.[40] However, in international commercial arbitration, particularly where a state or a state agency is a party, arbitral panels, though rarely, comprise of even much larger numbers. It may, however, be necessary or even desirable, in some exceptional cases to appoint an arbitral tribunal of five, seven or more arbitrators in a multi-party arbitration. The practice of states in appointing arbitral tribunal of five, seven or more is usually dictated by the political rather than practical considerations. It may relevant to note that the special considerations that apply to inter-state arbitrations do not apply to international commercial arbitration. The greater the number of arbitrators appointed, the greater the delay and expense likely to be incurred in the proceedings. Even in a case of major importance, three carefully chosen and appropriately qualified arbitrators should be sufficient to dispose of the issue in dispute satisfactorily. [41]

However, according to the analytical commentary on article 10, the 'two-level system' is a way of drafting a legislative provision where the first part grants the parties general freedom in regulating an issue while the second part sets forth the default rules which apply only when no such party stipulation is made. The hallmark of these provisions is the combination of the wording 'the parties are free to agree' (including the parties freedom of choice) and 'failing such an agreement' (setting out the default provisions).[42] The purpose of the parties choosing arbitration as against ordinary court litigation is that they expect a hand-picked expert tribunal to be able to resolve their dispute more proficiently, economically and expeditiously than the court litigation. The parties, therefore, have been given utmost freedom not only to choose their arbitrators but also to determine the number of arbitrators constituting the arbitral tribunal and the default tribunal shall consist of three arbitrators as well as unless otherwise agreed by the parties, where they appoint an even number of arbitrators, the appointed arbitrators shall

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40 Muatill and Boyd, *Commercial Arbitration,* second edn, 1989, pp 174, 189.

41 Redfern and Hunter, *Law and Practice of International Commercial Arbitration,* third edn, 1999, pp 195, para 4-19.

42 Peter Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions*, first edn, 2000, p 71, para 3-004.

jointly appoint an additional arbitrator who shall act as a Chairman of the tribunal[43] with a view to assure speed and proficiency.

4.2. Appointment of the Arbitrators:

Sub-sections (1) to (5), (7), (9) and (10) of section 12 of this Act adopt the substance of all the five sub-sections of article 11 of the UNCITRAL Model Law.

4.2.1. Party Autonomy and the Appointment Procedure:

The parties are free to agree on a procedure for appointing the arbitrator or arbitrators by making appropriate provision in the 'arbitration clause' or the agreement to submit.[44] In such a situation, the assistance of the third party is not necessary.[45] This freedom of the parties is to be given a wide interpretation. The most satisfactory result is where the parties agree on their tribunal...because if parties' do not agree on whom to appoint, they lose control over the composition of tribunal. The control then passes on to an appointing authority.[46]

4.2.2. Default Power to Appoint Arbitrators:

The most significant deviation from the Model Law is that section 12 uses the words 'District Judge and Chief Justice' instead of the word 'court' used in article 11. In other words, the Model Law permits court intervention in the matter of appointment of arbitrators, while this section abjures court intervention and vests the default power to appoint arbitrators in the 'District Judge in case of arbitration other than international commercial arbitration and in the Chief Justice or a Judge of the Supreme Court designated by the Chief Justice in case of international commercial arbitration'.[47]

The freedom of the parties under section 12, to agree upon appointment procedure is not unfettered. This freedom is restricted and subject to sub-section (4) of section 12. It states that unless the agreement on the appointment procedure provides other means for securing the appointment, a party may apply[48] to the District Judge in case of

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43 Section 11(3) of the Arbitration Act, 2001.

44 *National Sports Council Vs. A. Latif & Co.* 6 MLR (HC) 327.

45 *Iron & Steel Co. Ltd. v. Tiwari Road Lines* (2007) 5 SCC 703.

46 *Russell on Arbitration*, twenty-first edn, p 123, para4-050.

47 *Government of Bangladesh & others Vs. Samir and Co* 28 DLR (AD) 21.

48 *Glencore Int'l AG v. Hindustan Zinc Ltd.* (2003) 7 SCC 99; *D.S. Gupta v. Unions Hotels* (2002) 3 Arb LR 36 (Del).

arbitration other than international commercial arbitration or the Chief Justice or a Judge of the Supreme Court designated by the Chief Justice[49] in case of international commercial arbitration, in order to avoid deadlock or undue delay in securing the appointment of the arbitrator or arbitrators by enforcing the procedure agreed upon by the parties. Such application can be made in the following situations, viz, (i) where a party fails to appoint an arbitrator within thirty days of the receipt of a request to do so from the other party or, (ii) where the appointed arbitrators fail to agree on the third arbitrator within thirty days of their appointment. The power of the District Judge or Chief Justice or any other Judge of the Supreme Court designated by the Chief Justice, as the case may be, to appoint an arbitrator under sub-sections (3), (4) and (7) of section 12 can be invoked only on the request of a party. It is not an *ex officio* power.[50] In addition, the power exercisable by the Chief Justice under section 12(7) is not the power of the Supreme Court under the Constitution, but the power of a designate referred to under the section, albeit that it has now been held that the order has judicial characteristic. The Chief Justice by his designated nominee is not a *'persona designata'*, not an individual but a 'class'. Although the 'class' is not declared a 'court' but it is implied in the judgment which requires the Chief Justice to adjudicate all issue after giving proper hearing to the opposite party.[51]

4.2.3. Right to Appoint when Forfeited:

The analytical commentary on article 11(4) and (5) which correspond to sub-sections (7) and (12) support the view that the parties, by agreement, may not exclude the intervention by the District Judge in case of domestic arbitration and by the Chief Justice or any judge of the Supreme Court designated by the Chief Justice in case of international commercial arbitration.[52] In cases falling under section 12(7), no time limit has been prescribed under the Act, whereas a period of thirty days has been prescribed under section 12(3) and (4) of the Act. Therefore, if a party

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49 *S.B.P. & Co. v. Patel Engg. Ltd.* (2005) 8 SCC 618: (2005) 3 RAJ 388 (SC); *Kanagarani v. Dawarangan* 1998 Supp Arb LR 431 (Mad).

50 Malhotra, O P; *The Law and Practice of Arbitration and Conciliation*, first edn, LexisNexis(A division of Reed Elsevier India Pvt. Ltd.), New Delhi, India, 2002, p 404.

51 *S.B.P. & Co. v. Patel Engg. Ltd.* (2005) 8 SCC 618: (2005) 3 RAJ 388.

52 Peter Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions*, first edn, 2000, p 79-80, paras 3-028 and 3-029.

demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within thirty days of the demand, the right to appoint does not automatically forfeited after expiry of thirty days. If, however, the party makes an appointment even after thirty days of the demand, but before the first party apply to the District Judge or the Chief Justice or any other Judge of the Supreme Court designated by the Chief Justice, as the case may be, under section 12, that would be sufficient. That is to say, in cases arising under this provision, if the opposite party has not made an appointment within thirty days of demand, the right to make appointment is not forfeited but continues. But, the appointment has to be made before the former makes the application to the District Judge or the Chief Justice or any other Judge of the Supreme Court designated by the Chief Justice, as the case may be. And in case of failure[53] in this case, only then, the right of the opposite party ceases.[54]

4.2.4. Non-Discriminatory Approach Unless Otherwise Agreed By Parties:

Section 12(2) states that 'a person of any nationality may be an arbitrator, unless otherwise agreed by the parties' and article 11(1) of the Model Law says that 'no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties'.

Sub-section (2) of section 12 appears to be somewhat misfit in the context of this section because it is more concerned with personal characteristics of an arbitrator, while all other provisions of this section are of a procedural nature.[55] This provision is primarily directed at the state rather than at the parties. The legislature considered this provision necessary to overcome the bias against foreign nationals. It was designed to allow foreign nationals to act as arbitrators under this Act. It is not

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53 *Econ Consortium v. Delhi Metro Railway* (2006) 1 RAJ 554 (Del); *Indiana Engg. Wks. V. Cola India* (2003) 1 Arb LR 443 (Jhar); *S.P. Siva Prasadv. S.C. Rly.* (2002) 2 Arb LR 357 (AP).

54 *Union of India v. Bharat Battery Mfg. Co. (2007) 7 SCC 684; Punj LLOYD Ltd. v. Petronet MHB Ltd. (2006) 2SCC 638; Nucon India P Ltd v Delhi Vidyut Board (DESU)* AIR 2001 Del 227; *Datar Switcheears Ltd v Tata Finance Ltd* (2000) 8 SCC 151.

55 Peter Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions*, first edn, 2000, p 77, para 3-022.

mandatory[56] and is subject to the party autonomy. In other words, the parties by agreement can include or exclude persons of any nationality from being arbitrators in a domestic or international commercial arbitration under this Act. In the absence of such agreement to the contrary, a person of any nationality may be appointed as an arbitrator in arbitration held in Bangladesh under this Act. In an international commercial arbitration, the parties belong to different countries. They can appoint an arbitrator from another country or request an international arbitral institution to make the appointment either of the sole arbitrator or one or more members of the tribunal to assure equality of treatment.[57] Nevertheless, the practice usually followed in international commercial arbitration is to appoint a sole arbitrator or a presiding arbitrator of a different nationality from that of the parties to the dispute. In most of the institutional rules, the current practice is that the sole or presiding arbitrators will almost certainly be someone of a different nationality from that of the parties to the dispute. [58] However, the fact that an arbitrator is of a neutral nationality does not guarantee his independence or impartially. Nevertheless, the appearance is better and thus, it is a practice that is generally followed.[59]

4.2.5. Acceptance of Appointment:

However, there is no specific provision in the Act requiring acceptance of appointment by the person to be appointed as an arbitrator. Acceptance of the offer to be appointed as an arbitrator is not necessary to complete the appointment.[60] The appointment is complete as soon as it is made.

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56 *M.S.A. Nederland v. Larsen Turbo* (2005) 13 SCC 719: (2006) 2 RAJ 509 (SC); *Grid Corpn. V. ASE Corpn.* (2002) 7 SCC 636; *Malayasian Airlines Systems BHD(II) v. Stic Travels (P) Ltd.* (2000) 3 Arb LR 701 (SC).

57 *Russell on Arbitration,* twenty-first edn, 1997, p 10, para 1-016. The ICC Rules of Arbitration provide expressly that where the circumstances so demand, the sole arbitrator chairman of the arbitral tribunal shall be of a different nationality to that of the parties (art 2.6); Cf art 3.3 of the LCIA Rules'; art 20 (6) of the WIPO Arbitration Rules; art 6(40 of the AAA's International Arbitration Rules; Lalive, 'On the Neutrality of the Arbitrator and of the Place of Arbitration', *Swiss Essays on International Arbitration,* 1984, pp 23,25.

58 Redfern and Hunter, *Law and Practice of International Commercial Arbitration,* third edn, 1999, pp 215-16, paras 4-55 and 4-56.

59 Ibid., p216, paras 4-56.

60 *Keshav Singh Dwarka Dass Kapadia v Indian Engineering Co* AIR 1969 Bom 227, affairmed by the Supreme Court in *Keshav Singh Dwarka Dass Kapadia v Indian Engineering Co* AIR 1972 sc 1528.

Nevertheless, in practice, it is advisable to indicate acceptance in some form or other. It need not be in writing. It may be made orally or may be inferable from the conduct of the parties. Appointment of an arbitrator by a party is complete only on its communication to the other party. That is, nomination of the arbitrator should not only be made but, in order[61] to make the appointment effective, it must also be communicated to the other party within the period of thirty days.

4.2.6. Due Regard to Qualifications of Arbitrators:

Section 12(9), which adopts the substance of the second sentence of article 11(5) of the Model Law based on article 6(4) of the UNCITRAL Arbitration Rules, provides that the Chief Justice or a Judge of the Supreme Court designated by the Chief Justice, or the District Judge, as the case may be, in appointing an arbitrator under this section, shall have due regard to any qualifications required of the arbitrator under the agreement between the parties, and to such consideration as are likely to secure the appointment of an independent and impartial arbitrator. These criteria are obligatory because they flow from the 'arbitration agreement' and the statutory requirement of section 13 as well as section 23. In *Skankar Traders v. U.O.I.* (2007) 2 RAJ 549 (Cal) held, 'the Chief Justice would be entitled to appoint an independent arbitrator of his choice to decide the dispute. The wording of sec. 12(7) cannot be narrowly interpreted; the Chief Justice would have the discretion to appoint an arbitrator as per his own choice in his own discretion'. His Lordship laid down the qualification required of the arbitrator in this case and held that 'an experienced High Court Judge would be proper person to act as an independent arbitrator'. Regarding the delegation of power to a Judge of the Supreme Court by the Chief Justice under this section, the Seven Judges Bench has held in *S.B.P. & Co. v. Patel Engg. Ltd* (2005) 8 SCC 618: (2005) 3 RAJ 388 (SC) that 'the Chief Justice cannot designate a District Judge or non-judicial body to perform the functions under section 12 but the Chief Justice would be entitled to designate another Judge of his Court for exercising that power."[62]

4.2.7. Finality of the Decision:

The decision of the Chief Justice or a Judge of the Supreme Court designated by the Chief Justice, or the District Judge, as the case may be,

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61 *James Finlay and Co Ltd v Gurdyal* AIR 1924 Sind 91.

62 Malhotra, O P; *The Law and Practice of Arbitration and Conciliation*, first edn, LexisNexis(A division of Reed Elsevier India Pvt. Ltd.), New Delhi, India, 2002, p. 414.

on a matter entrusted to him under sub-sections (3), (4) and (7) of sections 12, is final. In view of the mandatory requirements of statute, finality is essential so that the arbitral tribunal can be constituted as soon as possible. It is neither amenable to judicial review nor is there any provision for setting aside or appeal against such order in the Act.[63]

4.2.8. Rule Making Power:

Section 12(11) empowers the Chief Justice or the District Judge, as the case may be, to make such **scheme** as he may deem appropriate for dealing with matters under this section. However, a scheme made by the Chief Justice cannot govern the interpretation of section 12. If a scheme goes beyond the terms of section 12, it is bad and needs amendment.[64]

4.2.9. Provisions Not Basing on the Model Law:.

The provisions of sub-sections 12(6), (8) and (13) are not based on any provision of the Model Law. Sub-section (6) states the situation where more than one arbitrators are appointed under sub-section (4), the District Judge or the Chief Justice or any other Judge of the Supreme Court designated by the Chief Justice, as the case may be, shall appoint one person from among the said arbitrators to be the Chairman of the arbitral tribunal. Regarding the duties of any other Judge of the Supreme Court as designated by the Chief Justice, sub-section (13) provides that the Chief Justice may entrust a Judge with the duties for a particular case or cases or for discharging the entire duties and may fix up the tenure of that Judge for the purposes of this section. The time limit for the appointment of arbitrator or arbitrators under sub-sections (3), (4) and (7) is provided in sub-section (8) stating that the appointment shall be made within sixty days from the receipt of the application thereof.

4.3. Matters dealt with by the 2001 Act on Which the Model Law is Silent:

4.3.1 Award of Interest by the Tribunal:

Section 38 of the Arbitration Act adopts the substance of Article 31of the UNCITRAL Model Law related with form and contents of the award. However, the matters like interest payable on the money where the arbitral award is for the payment of money and about the cost of

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[63] Ibid., p. 407.

[64] *Konkan Railway Corp Ltd v Mehul Construction Co* (2000) 7 SC 201.

arbitration, dealt under sub-sections 38(6) and (7) are not there in the Model Law, it is silent about these matters.

Article 31 sets forth the requirements of an arbitral award under the Model Law. These requirements, most of which are mandatory, range from the written form of the award and its signature to the delivery of the award.[65] Article 31(1) is modeled on art. 32(4) of the UNCITRAL Arbitration Rules; it requires that an arbitral award shall be signed by the arbitrators. For the sake of certainty, this provision is to be regarded as mandatory. The second sentence of this provision provides that in an arbitral proceeding with more than one arbitrator, the signature of the majority of all members of the arbitral tribunal shall sign, provided that the reason for any omitted signature is stated. Article 31(2) is based on art. 32(3) of the UNCITRAL Arbitration Rules, which provides that the arbitral award must state the reason upon which it is founded. Article 31(3) requires that an award should state the date and place of arbitration as determined by art. 20(1). Lastly, article 31(4) states that the signed award is to be delivered to each party.

4.3.1.1. Payment of Money and Interest:

Probably award for payment of money is the most common type of award. Such award directs one or more parties to pay certain sums of money to one or more other parties. Apart from the debt, it may include the amount computed by way of damages and interest. [66] Section 29 of the Arbitration Act 1940 authorized the court to order payment of interest on the decretal amount from the date of the decree at such rate as it deemed reasonable. Evidently, this was the power conferred by the statute on the court and not on the tribunal. However, on the principal that the arbitral tribunals have been awarding interests in different situations, this legislation generated a sizeable judicial gist on various aspects of awarding interests on the awarded amount of money. The earlier authorities were reviewed by a Constitutional Bench of five Judges of the Supreme Court.[67] Following that decision, a two-judge Bench of

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65 Peter Binder, *International Commercial Arbitration in UNCITRAL Model Law Jurisdictions*, first edn, 2000, p 186, para 6-048.

66 *Russell on Arbitration*, twenty-first edn, 1997, p. 288 paras 6-119 to 6-121; Robert Merkin, *Arbitration Law*, Lloyd's Commercial Law Library, para 16-53.

67 *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa v NC Budharaj* (2001) 2 SCC 721.

the court[68] held that on the basis of the earlier authorities, the arbitral tribunal can validly award interest at all the four stages, viz, (i) from the stage of accrual of cause of action till the filing of the arbitral proceeding; (ii) during the pendency of the proceedings before the arbitrator; (iii) future interest arising between the date of the award and the date of the decree; and (iv) interest arising from the date of the decree till the realization of the award. These four situations have now been codified and conflated in two situations in s 38(6), viz, (i) period between the date on which the cause of action arose and the date on which the award is made; and (ii) from the date of the award to the date of payment.

4.3.1.2. Party Autonomy Regarding the Award of Interest:

Section 38(6) makes it clear that party autonomy prevails and preserves the parties' right to agree what powers, if any, the arbitral tribunal shall have as regards the award of interest.[69] Furthermore, the parties may also confer powers on the arbitral tribunal, which may not be available to the court. In other words, the powers of the tribunal are flexible and can be made greater or narrower, more by agreement of the parties, then by the powers of the courts. For instance, parties can confer the power on the arbitral tribunals to award compound interest, which the courts may not be able to do. This means that by agreement, the parties may authorize the arbitral tribunal to award large sums in a way, which the courts cannot. Furthermore, the parties may also agree on the rate of interest to be paid on the awarded money from the date of the award to the date of the payment. The intention of the party may be contained in the arbitration agreement or submission to arbitration. However, the intention to exclude interest need not be contained in the arbitration clause itself, provided it can be construed as part of the arbitration agreement.[70]

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68 *TP George v State of Kerala* (2001) 2 SCC 758; *Exec. Engr. v. J.C. Budhiraj* AIR 2001 SC 626.

69 *Russell on Arbitration,* twenty-first edn, 1997, p. 295, para 6-140; *T.P. George v State of Kerala* AIR 2001 SC 861; *Socony Mobil Oil Co Inc v West of England Ship Owners Mutual Insurance Association Ltd (The Padre Island)* (NO 2) (1989) 1 Lloyd's Rep 239 (CA).

70 *Russell on Arbitration,* twenty-first edn, 1997, p. 295, para 6-140.

4.3.1.2. Defaulting Power to Include Interest at a Reasonable Rate:

In the absence of any agreement by the parties, this provision confers the default discretionary power to include in the arbitral award for payment of money, interest calculated at the rate as it deems reasonable.[71] The interest may be awarded on the whole or part of the awarded money. The tribunal has further discretion to award interest for the whole or any part of the period between the date on which the cause of action arose and the date on which the award was made. However, the interest on the awarded money shall be at the rate of two percent per annum, which is more than the usual Bank rate[72] from the date of the award to the date of payment.[73] This rate of interest, in the absence of any agreement by the parties to the contrary, is mandatory. It cannot be varied by the arbitral tribunal.[74] This discretion of the tribunal to award the rate of interest has to be judicially exercised on the principles of fairness, equity and good conscience.[75] The tribunal therefore has to bear in mind that 'the purpose of interest is to compensate the successful party for not having had at his disposal the amount awarded for a period of time.[76]

4.3.1.3. Interest *Pendente Lite:*

The question as to whether the arbitration tribunal has the power to award interest *pendente lite* generated a lot of decisional grist. In *Secretary, Irrigation Department, Orissa v DC Roy,*[77] *the arbitration agreement was silent* as to the award of interest. It did not provide for grant of such interest nor did it prohibit such grant. In this fact-situation the Supreme Court held to decide the question as to whether the arbitrator has the power to award interest *pendent elite*, and if so, on what principles. On a conspectus of the earlier authorities, the court stated the following principles:

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it

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71 *S. Kumar v. D.D.A.* (2003) 1 Arb LR 665 (Del).

72 Explanation of section 38 of the Arbitration Act, 2001 clarifies the word 'Bank Rate' under this sub-section which means the rate of interest as determined by the Bangladesh Bank from time to time.

73 *M/s. Bax Shipping Line v Bangladesh Water Development Board & another,* 7 MLR (AD) 37; *U.O.I. v. Arctic India* (2006) 4 RAJ 223 (Cal DB).

74 *Maharashtra Apex Corpn. Ltd. v. Sandesh Kumar* AIR 2006 Karn 138.

75 *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.* (2007) 8 SCC 466.

76 *Russell on Arbitration,* twenty-first edn, 1997, p. 296, para 6-144.

77 (1992) 1 SCC 508, 532-33.

by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of the Code of Civil Procedure, 1908 and there is no reason or principle to hold otherwise in the case of arbitration.

(ii) An arbitrator is an alternative form for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest *pendent elite*, the party claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.

(iii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. All the same, the agreement must be inconformity with the law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(iv) Over the years, the courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest *pendene lite*. *Thawardas*[78] has not been followed in the later decisions of this court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until *Jena case*[79] almost all the courts upheld the power of the arbitrator to award interest *pendent elite*. Continuity and certainty is a highly desirable feature of law.

(v) Interest *pendent elite* is not a matter of substantive law, like interest for the period anterior to reference. For doing complete justice between the parties, such power has always been inferred.

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78 *Seth Thawardas Pherumal v Union of India* AIR 1955 SC 468.

79 *Executive Engineer (Irrigation) Balimela v Abhaduta Jena* (1988) 1 SCC 418, 435.

4.3.2. Costs of Arbitration: Cost of Award and Cost of Reference

There was no specific provision in the Arbitration Act of 1940, with respect to awarding costs by the arbitral tribunal. The costs used to be awarded on general principles of law. Even in the UNCITRAL Model Law, there is no provision for awarding costs. Article 38 of the UNCITRAL Arbitration Rules requires the arbitral tribunal to fix the costs of arbitration in its award and defines the term 'costs'. Besides, there are ICC Rules, AAA Rules, LCIA Rules, SCC Rules and WIPO Rules, which authorizes the arbitral tribunal to fix costs of arbitration.

Under the Arbitration Act of 2001, the entire gamut of costs is covered in section 38(7). Subject to an agreement between the parties to the contrary, the tribunal is required to fix the costs of arbitration.[80] It further requires the tribunal to specify the party entitled to costs; the party who shall pay the costs; the amount of costs; or method of determination of determining that amount, and the manner in which the costs shall be paid.[81] It also defines the term 'costs' used in the expression 'costs of an arbitration' in the Explanation of the sub-section.

Before the enactment of this Act, there used to be a traditional distinction between 'costs of award' and 'costs of reference'. The former, broadly referred to the costs relating to administration of the arbitration and the latter referred to the costs incurred by the parties in preparation and presentation of their respective cases before the arbitral tribunal. This distinction, in practice, was relevant because usually tribunals used to assess the 'costs of the awârd' on a lump sum basis while the 'costs of reference' were awarded as agreed or taxed.[82]

4.3.2.1. Costs of the Award: Tribunal-Related Costs

The costs of the award are the expenses incurred for setting up and administration of the arbitration. Largely, these expenses are incurred for payment of the fees and expenses of the arbitrators and witnesses. They also include any other expenses incurred in connection with the arbitral proceedings and the arbitral award. These are termed as the 'costs of the award'. These are 'tribunal- related costs'.

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80 Section 38(7) (a), the Arbitration Act, 2001; *Prasar Bharati v. Stracon Ltd.* (2004) 3 RAJ 660 (Del).

81 Section 38(7) (b), ibid.

82 *Russell on Arbitration,* twenty-first edn, 1997, p. 300, para 6-155.

4.3.2.2. Costs of Reference: Party-Related Costs

The 'costs of reference' comprises of the expenses incurred for legal fees payable by the parties to their lawyers, other professionals and experts. They also include any fees payable to an arbitral institution for administration and supervision of the arbitration. These are the expenses incurred by the parties for preparation and presentation of their respective cases before the tribunal, generally termed as 'costs of reference'. These are the 'party- related costs'.

Sometimes the term 'costs of reference' was given wider connotation so as to include even the 'costs of the award' viz, all costs incurred in connection with the arbitration. These two terms are now been conflated to a single entity called the 'costs of arbitration'. The Arbitration Act 2001 has used the compendious phrase 'costs of arbitration' comprehending both the 'cost of award' and 'cost of reference'. The Explanation to section 38(7) defined the term 'costs' used in the expression 'costs of arbitration' to mean reasonable costs relating to –

(i) the fees and expenses of the arbitrators and witnesses,
(ii) legal fees and expenses,
(iii) any administration fees of the institution supervising the arbitration,
(iv) any other expenses incurred in connection with the arbitral proceedings and arbitral award.

4.3.2.3. Fees and Expenses of the Tribunal:

In the absence of any agreement by the parties to the contrary, the fees and expenses of the arbitrators have to be determined by the arbitral tribunal itself.[83] In exercising this jurisdiction, the tribunal has to perform a very delicate task particularly where the tribunal comprises of a sole arbitrator.

This responsibility has to be discharged with utmost sense of objective detachment. The tribunal's power to determine costs includes the power to determine the extent to which its own fees and expenses should be awarded. An arbitrator occupies a position of trust in respect to the parties. In charging for expenses and services he must be governed by the same high standards of honor and integrity as applies to legal and other professions. He must endeavor to keep the charges and expenses

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[83] Section 38(7) (a).

reasonable and commensurate with the nature of the services rendered by him. To avoid embarrassment of determining its own costs, it is wise to determine the level of fees of the members of the tribunal and the relevant expenses in an express agreement with the parties not later than the time of the tribunal's appointment. This protects a party from liability for the high level of fees of the arbitrator appointed by the other party, for which excess the appointing party remains liable to the arbitrator.[84]

In the absence of any express agreement about fees and expenses, the tribunal has to infer from the appointment of an arbitrator that he is entitled to reasonable fees for his services and the expenses incurred by him. However, from the appointment of an arbitrator it cannot be implied that he can increase his fees at the tie of awarding costs merely because the arbitration continued over a long period. The law of contract does not permit an arbitrator to impose an increase in its fees at the time of awarding costs. On the other hand, an attempt to increase fees while awarding costs is apt to justify the allegation of bias and vitiate the award as violative of the requirements of section 23.[85]

4.3.2.4. Reasonable Costs:

The definition of the term 'cost' in the Explanation to section 31(7) relating to the expenses incurred as specified in this provision, is preambled with the significant phrase 'reasonable costs relating to such expenses. The expression 'reasonable' has been judicially defined in the following words- 'we called that action reasonable which an informed, intelligent, just-minded, civilized man could rationally favor.[86] Socially, in contrast to logic there is common sense, or still better the spirit of reasonableness...the highest and sanest ideal of human culture and the reasonable man as the highest type of cultivated human being. No one can be perfect; he can only aim at being a likeable, reasonable being. The tribunal has to assess all the fees and expenses claimed, for determining the 'costs of arbitration' bearing in mind these guidelines.[87]

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84 *Russell on Arbitration,* twenty-first edn, 1997, p. 136-37, para 4-090.

85 Malhotra, O P; *The Law and Practice of Arbitration and Conciliation*, first edn, LexisNexis(A division of Reed Elsevier India Pvt. Ltd.), New Delhi, India, 2002, p. 728.

86 *Quaker City Cab Co v Penna* (1928) 277 US 389, 406.

87 Lin Yutang, *The Importance of Living,* Reynal & Hitchcock, New York, 1937, p 421.

4.3.2.5. Party Autonomy to Determine the Mode and Manner of Payment of Costs:

The parties are at liberty to agree upon the quantum, apportionment and determination of the mode and manner of payment of costs. An agreement between the parties with respect to payment of costs, even if not communicated to the tribunal, will prevail over the award ordering that each party should bear his own costs. However, if the administration of arbitration is entrusted to an arbitral institution, the problems relating to such arbitration will be dealt with according to the rules of the institution.[88] The arbitral tribunal must confine its attention strictly to facts connected with or leading up to the arbitration which have been proved before it or which it has itself observed during the arbitration proceedings and must not take into account consideration extraneous to the dispute, such as the prejudice of race or religion or sympathy with the unsuccessful party.[89] Though the expenses are incurred indirectly, they may far more exceed the expenses directly in arbitrations, particularly international commercial arbitrations involving large stakes. If these expenses are reckoned, perhaps, such arbitration may be much more costly than court litigation. Like litigation, even in arbitration, ultimately, as a loser is not a winner, even a winner is not a winner.[90]

4.3.3. Enforcement of Arbitral Award:

Prior to the Arbitration Act of 1940, an award could be executed in the same manner, to the same extent and subject to the same limitations as a decree of the court. However, under the Arbitration Act 1940, an award could be enforced by filing it in the court and obtaining a judgment and decree on it. Therefore, the order in execution of an award was appealable to the same extent as in execution of a decree.[91]

The parties to an arbitration agreement impliedly promise to one another to perform a valid award.[92] If the award is not performed by the losing party, the successful claimant can enforce it 'in the same manner as if it were a decree of the court', under the Code of Civil Procedure 1908. An arbitral award represents an agreement made between the parties, and is

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88 *Mansfield v Robinson* (1928) 2 KB 353. *malhotra 729.*

89 Mustill and Boyd, *Commercial Arbitration*, second edn, 1989, p 395.

90 Malhotra, O P; *The Law and Practice of Arbitration and Conciliation*, first edn, LexisNexis(A division of Reed Elsevier India Pvt. Ltd.), New Delhi, India, 2002, p. 728.

91 *Kanhaya Lal Cauba v Peoples Bank of Norther India* AIR 1934 Lah 49.

92 Mustill and Boyd, *Commercial Arbitration*, second edn, 1989, p 417.

no more and is no less enforceable than any agreement made between the parties.[93] Section 44 provides the summary procedure for enforcement of an award made under this Act; this is because the object of arbitration would be defeated if the successful claimant, having succeeded in an arbitration, had again to litigate to enforce his agreement. The parliament, therefore, has provided summary procedure excluding court intervention.

Generally, the arbitral awards are implemented without resorting to execution proceedings. This procedure, however, is available only where the arbitral award emanates from an arbitration conducted pursuant to an arbitration agreement within the meaning of section 2(n) and section 9 of the Act. If the arbitration agreement, on which the arbitration is based, is *de hors* the statutory definition, the procedure postulated by section 44 will not be available because the provisions of this Act will not be applicable to such agreement. The award creates a new right or rights in favour of the successful party, which he can enforce in the courts in substitution for the rights upon which the claim or the defence respectively were founded. The award has two further consequences. First, it precludes either party from contradicting the decision of the arbitrator on any issue decided by the award, and also upon any issue that was within the jurisdiction of the arbitrator to decide but which, whether deliberately or accidentally, he was not asked to decide. Secondly, the award can operate to bar the claimant, whether successful or unsuccessful, from bringing the same claim again in a subsequent arbitration or action.[94]

4.3.3.1. International Commercial Arbitration:

An award relating from an international commercial arbitration will have to be enforced according to the international treaties and conventions. Important regional and international treaties and conventions relate to the recognition and enforcement of foreign arbitral awards. The New York Convention 1958 is one of the most widely used conventions for recognition and enforcement of foreign awards. It sets forth the procedure to be followed for this purpose, whilst specifying the limited grounds on which recognition and enforcement of such awards may be refused by a court of the contracting state.[95]

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93 Bernstein, *Handbook of Arbitration Practice,* third edn, 1998, p 260, para 2-883.

94 Bernstein, *Handbook of Arbitration Practice,* third edn, 1998, p 259.

95 Redfern and Hunter, *Law and Practice of International Commercial Arbitration,* third edn, 1999, p 10, para 1-15

However, Section 45 of the Arbitration Act 2001 provides that unless there is any of the ground enumerated under section 46 for refusal, any foreign award shall be executed upon an application made to the Court of the District Judge, Dhaka by any party in accordance with the Provision of the Code of Civil Procedure 1908 as if it were a decree of the Court.[96]

4.3.3.2. Time limit:

An award can be enforced only after 'the time for making an application to set aside the arbitral award[97] under section 42 has expired or such application having been made has been refused'.[98] An application to the court for setting aside the award has to be made within sixty days from the date on which the applicant had received the arbitral award.[99] The expression 'such application having been made has been refused' implies that if the parties making the application fail to proof the grounds as enumerated in section 43(1) (a)[100] or fail to satisfy the Court or the High

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96 *Banerjee v M.N. Bhagwata* (2002) 3 Arb LR 113 (Gau).

97 *Adamjee Sons Ltd. v Jiban Bima Corporation,* 45 DLR 89 ; *A Latif and Company Ltd. Project Director P.L. 480 LGED & others,* 9 MLR (HC) 137; *Chittagong Steel Mills Ltd. & another v M/s MEC, Dhaka 7 others,* 10 MLR (HC) 113.

98 *Morgan Securities v Modi Rubber Ltd.* AIR 2007 SC 183; *NALCO v Pressteel & Foundations Ltd.* (2004) 1 RAJ 1; *Vipul Agarwal v Atul Kanodia* AIR 2004 All 205; *City Scope Developers Ltd. v Alka Builders* (2000) 1 Cal HN 381; *Delta Constn. V Narmada Cement* (2002) 2 Arb LR 47 (Bom).

99 Section 42, the Arbitration Act, 2001.

100 An arbitral award may be set aside if the party making the application furnishes the proof that –

(i) a party to the arbitration agreement was under some incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it ;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable due to some reasonable causes to present his case;

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or it contains decision on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which, contains decisions on matters not submitted to arbitration may be set aside;

Court Division, as the case may be, about the matter as stated in section 43(1) (b),[101] the application for setting aside the arbitral award may be refused. However, in a case it was held that an award can be enforced even if the appeal against the order refusing to set aside the award is pending.[102] Thus, an award, which has become 'final and binding', can be enforced in accordance with the provision of Part II and Order 21 of the Code of Civil Procedure 1908.

4.3.3.3. Decree of the Court:

The expression 'decree' has been defined in section 2(2) of the Code of Civil Procedure 1908 in the following words-

'Decree' means the formal expression of an adjudication, which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include-

(a) any adjudication from which an appeal lies in an appeal from an order, or

(b) any order of dismissal for default.

Explanation: A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act.

[101] The Court or the High Court Division, as the case may be, is satisfied that-

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force in Bangladesh;

(ii) the arbitral award is prima facie opposed to the law for the time being in force in Bangladesh;

(iii) the arbitral award is in conflict with the public policy of Bangladesh; or

(iv) the arbitral award is induced or affected by fraud or corruption.

[102] *Vipul Agarwal v Atul Kanodia* AIR 2004 All 205.

4.3.3.4. Ex- Parte Decree:

Section 35(4) provides that if without sufficient cause a party fails to attend or be represented at an oral hearing of which due notice is given or where matters are to be dealt with in writing fails, after due notice, to submit written evidence or make written submissions, the arbitral tribunal may continue the proceedings in the absence of that party or , as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence before it. The ex-parte award made by the tribunal in such proceedings will be enforceable under section 44.

4.3.3.5. Settlement Award:

From a juxtaposition of section 2(b) and section 22, it would appear that the settlement award shall be enforced in the same manner as if it were a decree made by a court having jurisdiction to decide questions forming the subject-matter of the arbitration if the same had been the subject matter of the suit. Section 22 has been designed to encourage settlement of a dispute, with the agreement of the parties by alternative methods of dispute resolution by using mediation, conciliation or any other procedures at any time during the arbitral proceedings.[103] The settlement arrived at between the parties will be recorded by the tribunal 'in the form of an arbitral award on agreed terms'.[104] The award on agreed terms shall be made in accordance with section 38 stating that it is an arbitral award on agreed terms[105] and such award shall have the same status and effect as any other arbitral award on the substance of the dispute.[106]Such award shall be enforceable under section 44 in the same manner as if it were a decree of the court.

4.3.3.6. Executing Court:

From the relevant provisions of the Code of Civil Procedure 1908, [107] it would appear that the court which can entertain a suit with respect to the subject-matter of the dispute in arbitration alone can exercise the executing power under section 44 of this Act. This is implied in the language of section 44 itself. Explanation to section 44 provides that the

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103 Section 22(1), the Arbitration Act, 2001.

104 Section 22(2), ibid.

105 Section 22(3), ibid.

106 Section 22(4), ibid.

107 Sections 14, 15 to 20 and section 38 of the Code of Civil Procedure, 1908.

expression 'court' in this section means the court within the local limits of whose jurisdiction the arbitral award has been finally made and signed and in case of enforcement of foreign arbitral awards under section 45 the concerned court is the District Judges Court exercising the jurisdiction with in the district of Dhaka for the purpose of this section.[108]

4.3.4. Appeals in Respect of Certain Matters:

In the arbitration Act, 1940 section 39 contained provisions of appeal against certain orders in different tiers in the hierarchy of the ordinary courts.[109] Section 48 of newly enacted Arbitration Act, 2001 provides for appeal only to the High Court Division against certain specific orders[110] passed by the Court of District Judge. The orders against which appeal lies to the High Court Division include an order made under section 42(1) by the District Judge setting aside or refusing to set-aside an arbitral award[111] other than international commercial award,[112] against an order

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[108] Explanation to Section 45, the Arbitration Act, 2001.

[109] *MLR on Law of Arbitration,* first edn, Mainstream Printing and Publications, Dhaka, Bangladesh, 2005, p. 93.

[110] *Great Eastern Shipping Co. v Board of Trustee Port of Calcutta* (2005) 1 Arb LR 389 (Cal DB); *Sudarshan Chopra v Vijaya* Chopra (2003) 117 Comp Cas 660 (P&H); *U.O.I. v Monoranjan Mondal* (2000) 1 Arb LR 326 (Cal).

[111] Section 43(1): Grounds for setting aside arbitral award- An arbitral award may be set aside if the party making the application furnishes the proof that –

(i) a party to the arbitration agreement was under some incapacity;
(ii) the arbitration agreement is not valid under the law to which the parties have subjected it ;
(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable due to some reasonable causes to present his case;
(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration or it contains decision on matters beyond the scope of the submission to arbitration; Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which, contains decisions on matters not submitted to arbitration may be set aside;
(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the

passed by the District Judge[113] refusing to enforce an arbitral award under section 44,[114] against an order passed by the District Judge, Dhaka under section 45 refusing to recognize or enforce[115] any foreign arbitral

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absence of such agreement, was not in accordance with the provisions of this Act.

112 Section 48(a), the Arbitration Act, 2001.

113 According to Explanation to Section 44 of the Arbitration Act, 2001, here the District Judge shall be the person under whose local jurisdiction the arbitral award is finally made and signed.

114 Section 48(b), the Arbitration Act, 2001.

115 Section 46(1) provides the grounds for refusing recognition or execution of foreign arbitral awards stating that- recognition or execution of foreign arbitral awards may be refused only on the following grounds, namely-

a. if the party against whom it is invoked furnishes proof to the Court that-

(i) a party to the arbitration agreement was under some incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it ;

(iii) the party against whom it is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable due to some reasonable causes to present his case;

(iv) the concerned foreign arbitral award contains decision on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those

not so submitted, only that part of the arbitral award which, contains decisions on matters submitted to arbitration may be recognized and enforced;

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, in the absence of such agreement, was not in accordance with the law of the country where the arbitration took place;

(vi) the award has not yet become binding on the parties, or has been set-aside or suspended by a competent authority of the country in which, or under the law of which, that award was made; or

b. the court in which recognition or execution of the foreign arbitral award is sought, finds that-

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force in Bangladesh; or

(ii) the recognition and execution of the foreign arbitral award is in conflict with the public policy of Bangladesh.

award.[116] However, an appeal against the decision of the High Court Division shall lie to the Appellate Division of the Supreme Court as per Article 103 of the Constitution of the People's Republic of Bangladesh.

4.3.4.1. Time for Preferring Appeal:

There is no provision in this section specifying the period of limitation within which a party is required to appeal from the decision of the court. However, section 55(1) makes the Limitation Act applicable to the arbitrations subject to the provisions of this Act in the same manner as they apply to the court proceedings. By virtue of this provision, an appeal to the High Court Division from any decree or order has to be filed within 90 days from the date of the decree or order.[117] Under sub-section (3), the court can extend the period of limitation in appropriate cases where it thinks proper for the interest of justice. Sub-section (4) provides for the exclusion of the period between the commencement of the arbitration under section 27 and the date of the order of the court setting aside the award in computing the period of limitation.

4.3.5. Fixing the Amount of Deposit as an Advance for the Cost of Arbitration:

This provision appears to have been inspired by the modern practice in various jurisdictions, particularly the arbitral institutions, authorizing the arbitral tribunal to require the parties to make a deposit, as an advance for costs of arbitration. In many instances nowadays, particularly in the case of long arbitrations, the arbitrator makes sure of his fees, either by causing them to be secured by a deposit or otherwise, or by requiring payments on account. It is common practice for arbitration institutions and arbitral tribunals to make steps to secure their fees in advance.[118] This purpose is achieved by conferring power on the arbitral tribunals to call for advance payments for covering the costs, which it expects to be incurred in respect of the arbitration of the claim submitted. For judicious exercise of this power, it will be opportune that the question of deposits is discussed not only with members of the tribunal but with the parties to the arbitration to assess the amount of work and time involved

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116 Section 48(c), the Arbitration Act, 2001.

117 *O.N.G.C. v Jagson Int'l. Ltd.*(2005) 3 RAJ 555 (Bom).

118 *Rickmers Verwulting Gmb. H. v I.O.C.* (1998) 6 scale 197; Eacom's *Controls Ltd. v Boiey Controls Co.* AIR 1998 Del 365; *S.T.C. v Vishwa Oil Products* (1992) 2 Arb LR 191.

from which a fair estimate of the costs may be ascertainable. [119] In institutional arbitrations, the parties are required to deposit with the institution supervising the arbitration an estimated amount as advance, on account of arbitrators' fees and administrative expenses of the arbitration.[120] If along with the response to the claim of the claimant, the respondent submits a counter-claim, the tribunal may fix separate amount of deposit for the counter-claim as well. Thus, the deposit for the claim and the deposit for the counter-claim will be separately assessed and fixed by the tribunal in consonance with their respective incidents.[121] The mandate of this provision requires that the amount of deposit towards the claim and counter claim 'shall be payable in equal share by the parties'. If however, one party fails to pay his share of the deposit, the other party, in the exigencies of the situation, with a view to facilitate further movement of arbitral proceedings, has the option to pay the share of the defaulting party as well.[122] Thus, the liability of the parties to pay the fee of the arbitrators and the cost of arbitration is joint and several.

4.3.5.1. Consequence of Non-Deposit:

In a possible, though normally unlikely situation, where the parties fail to deposit the amounts as assessed and required to be deposited, the arbitral tribunal may terminate the arbitral proceedings once and for all. After the proceedings are terminated, the tribunal becomes *functus officio*, in respect of the claim or counter-claim, as the case may be.

Alternatively, it may refuse to make an award to the parties. This is known as lien on the arbitral award sanctioned by section 50 of the Arbitration Act, 2001. This is now almost a universal method for securing payment of any unpaid costs of arbitration that the tribunal has a mandatory lien on the arbitral award. This right, however, is subject to two elements namely,[123] (i) an arbitration agreement by the parties to the contrary i.e the party autonomy and (ii) the provisions of sub-section (1) i.e. court intervention. The traditional method by which arbitral tribunals have secured payment has been to with hold the award from the party

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119 Malhotra, O P; *The Law and Practice of Arbitration and Conciliation*, first edn, LexisNexis(A division of Reed Elsevier India Pvt. Ltd.), New Delhi, India, 2002, p. 861.

120 Bernstein, *Handbook of Arbitration Practice,* third edn, 1998, p 286.

121 Proviso of section 49(1), the Arbitration Act, 2001.

122 Section 49(2), ibid.

123 Section 50(4), ibid.

seeking to take it up until any outstanding fees have been paid, effectively to exercise a lien over the award.[124]

4.3.5.2. Judicial Intervention in Unreasonably Exorbitant or Unwarranted Costs:

If a party feels that the costs of arbitration demanded by the tribunal are unreasonably exorbitant or unwarranted, it may make an application to the court for directions to deliver the award. On receipt of such application, in the first instance, the court will order the applicant to deposit the entire amount of costs, as demanded by the tribunal, into the court. After the amount demanded by the arbitral tribunal has been deposited, the court may hold such enquiry into the matter as it thinks fit, and further order that out of the money deposited by the applicant into the court, such amount as it may consider reasonable should be paid to the tribunal and the balance money, if any, shall be refunded to the applicant.[125]

However, if the fee demanded by the tribunal has been fixed by written agreement between the applicant and the arbitral tribunal, the provisions of section 50(1) won't be applicable. In other words, where the parties have agreed to the level of fees with the tribunal, the agreement cannot be reviewed by the court. In the absence of such agreement, in an application under section 50(1) with respect to the fee of the arbitral tribunal and cost of the arbitration, by default, the arbitral tribunal shall be entitled to appear and make its presentation contesting the application.[126] If a question with respect to the costs of arbitration demanded by the arbitral tribunal arises before the court and the award does not contain sufficient provisions concerning them, the court has the power to make such orders as it thinks fit in this connection.[127]

However, the adjustment procedures of the court help a party who has not agreed to the level of fees with the tribunal is unable to obtain delivery of the award without paying those fees in full because the tribunal is exercising its lien, and claims that the tribunal's demand is excessive. There is authority that a party who has paid an excessive sum

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124 *Russell on Arbitration,* twenty-first edn, 1997, p 140, para 4-099.

125 Section 50(1), the Arbitration Act, 2001.

126 Section 50(2), ibid.

127 Section 50(3), ibid.

to obtain delivery of an award may recover the excess beyond what is reasonable in an action against the tribunal in restitution.[128]

4.3.6. Non-Discharge of Arbitration Agreement by Death of a Party:

This section re-enacts the provisions of section 6 of the Arbitration Act 1940 under the same heading-arbitration agreement not to be discharged by death of a party thereto with minor variations like the words 'revoked' and 'authority' in 1940's Act have been replaced with the words 'affected' and 'mandate' in section 51(1)(b) of the new Act.

4.3.6.1. Effect of Death on Arbitration Agreement:

The provisions of this section which provide that an arbitration agreement is not discharged by the death of a party to the arbitration agreement[129] either with respect of the deceased or any other party unless otherwise agreed by the parties is mandatory. After the death of a party, the arbitration agreement is enforceable by or against the legal representatives of the deceased[130] provided that the right to sue or be sued survives.

4.3.6.2. Effect of Death on Mandate of Arbitrator:

The death of a party will also not affect the mandate of an arbitrator whom he had appointed unless otherwise agreed by the parties.[131] This is because an arbitrator appointed by a party is not a representative of the party appointing him. However, this is subject to the operation of any law relating to abatement of right through the death of a person.[132]

4.3.6.3. Effect of Operation of Other Law:

The provisions of this section will not affect the operation of any law relating to abatement of right through the death of a person codifies the maxim *actio personalis moritur cum persona*-the cause of action dies with a person. That is to say, when the right of a party to sue or be sued does not survive, the arbitration agreement will be discharged or if the reference has already been made, the arbitrators mandate will be terminated on the death of that party.[133] Conversely, if the right is not extinguished by the death of the party in the arbitration, the arbitration

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128 *Russell on Arbitration,* twenty-first edn, 1997, p 140-41, para 4-100.

129 *Chandra Nath v Suresh Jhalani* (1999) 8 SCC 628.

130 Section 51(1) (a), the Arbitration Act, 2001.

131 Section 51(1) (b), ibid,; *Brimco Bricks v Sitaram Agarwal* AIR 1998 RAJ 71.

132 Section 51(2), ibid.

133 *Balika Devi v Kedar Nath Puri* AIR 1956 All 377.

agreement or the arbitral proceedings, as the case may be, shall not be terminated. The deceased party's legal representatives will have to be brought on record as parties to the arbitration in order to make the award binding on them.[134] A legal representative[135] may submit to arbitration any matter relating to the state of the deceased or may enter into agreements without being personally liable, provided he acts in good faith. It is the duty of the arbitrator to serve notice on the legal representatives of the deceased parties calling upon them to appear before him and to continue with the reference.[136] The legal representative must be given reasonable time to participate in the proceedings. On being notified, the representatives of the deceased have the right to oppose the arbitral proceedings. If these requirements of due process are not complied with, the legal representative is not bound by the award resulting from the arbitral proceedings.[137] In a case where the arbitral proceedings concluded before the death of a party and nothing remains further to be done by the arbitrator except making the award, the award would be binding on the legal representatives of the deceased party.[138] However, before making the award, the arbitral tribunal will require the legal representatives of the deceased party to establish his right to enforce the award.[139]

4.3.7. Rights Regarding Bankruptcy Proceedings:

In a case where the arbitration clause in a contract, to which an insolvent is a party, provides that any dispute arising out of or in connection with such contract, shall be submitted to arbitration, it will be enforced by or against the receiver,[140] in so far as it relates to any such dispute, if he adopts the contract.[141] That is to say, if the receiver does not adopt the contract, the arbitration clause cannot be enforced by or against the

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134 *Ramniwas Jhunjhunwalla v Benarshi L Jhunjhunwalla* AIR 1968 Cal 314.

135 Section 2(a) of the Arbitration Act, 2001 defines 'legal representative' meaning 'a person who in law represent the estate of a deceased person, and includes any person who intermeddles with the state of the deceased and where a party acts in a representative character the person on whom the estate devolves on the death of the party so acting.

136 *Lilawati v U.O.I.* (2004) 3 RAJ 214 (Gau).

137 *Tirtha Lal v Bhusan Moye Dasi* AIR 1949 FC 195.

138 *Beni Datt v Baijnath* AIR 1938 Odhu 125.

139 *Shivchandraj Jhunjhunwalla v Panno Bibi* AIR 1943 Bom 197.

140 According to Explanation to section 52 of the Arbitration Act, 2001, the expression 'receiver' means the receiver as explained in clause (4) of section 2 of the Bankruptcy Act.

141 Section 52(1), the Arbitration Act, 2001.

receiver. An insolvent is not deprived of his right to the contract, but his estates passes to the receiver in insolvency proceedings subject to the insolvency legislation. From the language of the statute, it is evident that an insolvent can refer any dispute arising out of or in connection with the contract containing the arbitration clause. However, a receiver cannot enter into a fresh agreement.[142] If a party becomes insolvent during the course of the arbitration proceedings, the resulting award will not be binding on the receiver if he has not been given notice.

4.3.7.1. Judicial Intervention in Referring the Matter to Arbitration:

In a case where a person who has been adjudged an insolvent had become a party to an arbitration agreement, before the commencement of the insolvency proceedings, and any matter to which the agreement applies is required to be determined in connection with, or for the purpose of bankruptcy proceedings, then, if the case is one to which sub-section (1) does not apply, any other party or the receiver may apply to the judicial authority having jurisdiction in the bankruptcy proceedings for an order directing that the matter in question shall be submitted to arbitration in accordance with the arbitration agreement and the Bankruptcy Court may, if it is of opinion that, having regard to all circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.[143]

4.3.8. Court Having Exclusive Jurisdiction over the Arbitral Proceedings:

4.3.8.1. Jurisdiction over Arbitral Proceedings:

Section 53 opens with a *non obstante* clause and is comprehensive in scope. That is to say the provisions of this section will have overriding effect on anything contained in this Act or any other law for the time being in force, 'where with respect to an arbitration agreement any application under this Act has been made in a court, that court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that court and in no other court.[144] To that extent, it carves out an

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142 *Re Dehra Dun Mussoorie Tramway Co Ltd* AIR 1928 All 553.

143 Section 52(2)(a) and (b), the Arbitration Act, 2001.

144 Section 53(a) & (b), ibid.; *Punjab Land Development & Reclamation Corpn v Jai Shankar Transport* (2001) 1 Arb LR 474, 476 (P&H); *DLF Industries Ltd v Standard Chartered Bank* AIR 1999 Del 11; *ITI Ltd v District Judge, Allahabad*

exception to the general rule of jurisdiction of the court in which an application may be filed elsewhere provided in this Act in respect of the proceedings referred therein. [145]

The use of the expression 'with respect to an arbitration agreement' in section 53 of this Act makes it clear that where, at any time, after the arbitration agreement has come into existence, any one of the parties makes an application to a court 'with respect to the arbitration agreement', that court alone[146] shall have the jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings'[147] to the exclusion of any other court. Sections 7A, 10 of this Act contemplate pre-award applications to be filed before submission of the dispute to arbitration. Post-award applications are to be filed under section 42 for setting aside the award and under section 50, in connection with the lien of the arbitrator. Therefore, if an application has been filed in a court under section 10, all subsequent applications will have to be filed in the same court. [148]However, courts cannot assume jurisdiction where the statute contains a specific section conferring jurisdiction on a particular court to decide a matter. Such a provision automatically ousts jurisdiction of other courts.[149]

This section has to be read with the definition of 'court' in section 2(b)[150] along with the explanations at the end of the sections 15,[151] 43,[152] 44[153]

AIR 1998 All 313, 316; *Sirojexport Co Ltd v Indian Oil Corpn Ltd* AIR 1997 RAJ 120;

145 Malhotra, O P; *The Law and Practice of Arbitration and Conciliation*, first edn, LexisNexis(A division of Reed Elsevier India Pvt. Ltd.), New Delhi, India, 2002, p. 873.

146 *Pandey & Co v State of Bihar* (2006) 2 RAJ 285 (Pat DB); *Sasken Communications v Prima Telesystems* (2002) 3 Arb LR 388 (Del).

147 *Amarchand v U.O.I.* (2004) 2 Arb LR 231 (P&H).

148 Malhotra, O P; *The Law and Practice of Arbitration and Conciliation*, first edn, LexisNexis(A division of Reed Elsevier India Pvt. Ltd.), New Delhi, India, 2002, p. 874.

149 *Rite Approach Group v Rosoborow Export* (2006) 1 SCC 206.

150 'Court' means District Judge's Court and includes Additional Judge's Court appointed by the Government for discharging the functions of District Judge's Court under this Act through Gazette Notification.

151 Explanation to section 15 provides that 'District Judge' means District Judge within whose local jurisdiction the concerned arbitration agreement has been entered into.

and 45[154] respectively where the expression 'court' means the District Judge's Court within whose local jurisdiction the concerned arbitration agreement has been entered into or within the local limits of whose jurisdiction the arbitral award has been finally made and signed or District Judge's Court exercising the jurisdiction within the district of Dhaka.

4.3.9. Applicability of the Limitation Act, 1908 to Arbitrations:

Section 55 makes the Limitation Act applicable to arbitrations 'subject to' the provisions of the Arbitration Act, 2001 as it applies to proceedings in court.[155]That is to say, the provisions of the Limitation Act shall not apply where the special enactment makes a specific provision prescribing period of limitation or for condonation of delay, but it may apply where there is no specific prohibition and the provision would advance the cause of justice.[156] This indicates that the statute of limitation applies to the arbitral proceedings as well as to the proceeding in court. For the purpose of section 55 and the limitation act, an arbitration shall be deemed to have commenced on the date referred to in section 27,[157] which provides that the parties have the opinion to agree upon the point of time for commencement of the arbitral proceedings. In the absence of such agreement, by default, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by any party to the agreement or any party to the agreement has received from another party to the agreement a notice requiring that party to appoint an arbitral

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152 Explanation to section 43 states that the expression 'court' in this section means the court within the local limits of whose jurisdiction the arbitral award has been finally made and signed.

153 Explanation to section 44 states that the expression 'court' in this section means the court within the local limits of whose jurisdiction the arbitral award has been finally made and signed.

154 Explanation to section 45 provides that the expression 'court' shall mean the District Judge's Court exercising the jurisdiction within the district of Dhaka for the purposes of this section.

155 Section 55(1), the Arbitration Act, 2001.

156 *State of Goa v Western Builders* (2006) 6 SCC 293; *U.O.I. v Shring Construction Co* (2006) 8 SCC 18: (2006) 3 RAJ 580 (SC); *Anus Khader v Abdul Nasar* (2000) Supp Arb LR 382.

157 Section 55(2), the Arbitration Act, 2001.

tribunal or to join or concur in or approve the appointment of, an arbitral tribunal in relation to the dispute.[158]

4.3.9.1. Extension of Limitation Period:

Section 55(3) provides for the extension of the period of limitation as the interest of justice may require, for such period on such terms, if any, as the court thinks proper. Therefore when an arbitration 'agreement to submit' , future disputes to arbitration, provides that any claim to which the agreement applies shall be barred unless some steps to commence arbitration proceedings is taken within the time fixed by the agreement, it is in the discretion of the court to extend the time for such period as it thinks proper . However, before exercising this discretion, the court must be of the opinion that, in the circumstances of the case, extension of time is required for the interest of justice. Then, notwithstanding the fact that the time limit has already expired, the court may extend the time for such period as it thinks proper and time may be granted subject to such terms, as the justice of the case may require.[159] However, the discretion to extend the time is neither automatic nor *ex officio*. It has to be granted by the court on an application being made by a party to the agreement responsible for the expiry of the prescribed time limit. In the absence of an application, the court will not entertain the request for extension of time.[160] Such party not only must promptly apply for extension after expiry of time or as soon as he comes to know of it but he must also satisfy the court that the extended time is required for the interest of justice.[161]

4.3.9.2. Computation of Time:

Section 55(4) provides that for the purpose of computing the period of limitation, where the court orders that an arbitral award be set aside, the period of time between the commencement of arbitration and the date of the order of the court setting aside the award shall be excluded. The expression 'court' used in this provision means not only the court under section 44 but it also includes the Court of Appeal under section 48. It

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158 *Hari Shankar Singhania v Gour Hari Singhania* AIR 2006 SC 2488; (2006) 4 SCC 658/679; Mir *Gulam Hasan v State* (2005) 4 RAJ 536 (J&K); *Municipal Corpn. V Jasbir Singh* (2003) 1 RAJ 420 (Del).

159 Section 55(3), the Arbitration Act, 2001.

160 *State of Gujarat v Sheth Construction Co* (1990) 1 Arb LR 387 (DB).

161 *Raymond and Reid v Grange* 1952) 2 All ER 152.

has to be borne in mind that such exclusion of time is in terms of section 55 and not under section 14 of the Limitation Act, 1908.[162]

5. Concluding Observations:

In this year i.e. in 2008, the Arbitration Act, 2001 having completed seven eventful years, enters upon the eighth year of its life. This Act as we know that with significant interpolations, adopts the Model Law in its entirety. However, as its name suggest, the Model Law is only a 'model' of law on international commercial arbitration, it is far from comprehensive leaving many important areas of arbitration law and practice unexplored since its promoters had limited their aims only to provide a model for the states desiring uniformity with harmonization in arbitration legislation. This Act, therefore, inherits all the weaknesses and shortcomings of its model. From the beginning of the enforcement, it revealed a host of problems of application and interpretation of its various provisions, which are now solving by the courts through judicial legislations. Though these are noble and benevolent predilections by the Judges, then also they should not trespass into the forbidden territory of legislation in the guise of interpretation and bend the arm of law only for adjusting equity. On the other hand, about the major disparities and deviations, one of the inexcusable disparities is related to the appointment of arbitrators in international commercial arbitration, which causes a deprivation to Bangladeshi citizens excluding them to be appointed as an arbitrator in an international commercial arbitration between a Bangladeshi and a foreign person. In allowing unrestricted freedom to appeal against certain orders, the drafter failed to imagine that it would in effect make the award inoperative which the legislature seems to have overlooked its implications, which among the other things defeat the purpose of such an order. Therefore, it is the duty of the Legislature to fix this leaking umbrella and remove all the lacunas through radical amendments with the assistance of highly powered Commission constituted of the available jurists, judges, professors, legislators and other persons who are well-versed in the subject and guidance may even be sought from the English Arbitration Act, 1996 which is, in fact, a masterly product in arbitration.

Nevertheless, some outstanding provisions like, stating the law in plain and simple language, settlement other than arbitration during the arbitral proceeding, global approach of the Act making the Act and some specified provisions of the Act applicable where the place of arbitration is

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[162] *State of Goa v Western Builders* (2006) 5 SCC 274; *Jugal Kishore Asati v State of Madhay Pradesh* AIR 1979 MP 89, 93.

in or outside Bangladesh respectively, judicial intervention in unreasonably exorbitant or unwarranted costs, legal or other representation, uneven number of arbitrators, contribution in raising the parties' confidence in arbitration by guaranteeing them a formal award, covering international commercial arbitration, recognition and enforcement of foreign arbitral award and all other arbitrations of domestic nature, making provisions for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration, providing that the arbitral tribunal gives reasons for its arbitral award, ensuring that the arbitral tribunal remains with in the limits of its jurisdiction and minimizing the supervisory role of courts in the arbitral process are brining a silver lining to the cloud which, will in future, if properly implemented, makes it more responsive to contemporary requirements and represent it as an striking innovation in the specified field of arbitration.